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CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 939.

RICHARD L. DAVEY, PETITIONER, PLAINTIFF AND APPELLANT,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, A CORPORATION, AND LEHIGH VALLEY RAILROAD COMPANY, A CORPORATION, JOINTLY, SEVERALLY, OR IN THE ALTERNATIVE, RESPONDENTS, DEFENDANTS AND RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY AND BRIEF IN SUPPORT THEREOF.

DOUGAL HERR,
JULIUS LICHTENSTEIN,
JOHN H. KELLEY,
Counsel for Petitioner, Plaintiff and Appellant.

(33,937)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 628

RICHARD L. DAVEY, PETITIONER, PLAINTIFF AND APPELLANT,

versus

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, A CORPORATION, AND LEHIGH VALLEY RAILROAD COMPANY, A CORPORATION, JOINTLY, SEVERALLY, OR IN THE ALTERNATIVE, RESPONDENTS, DEFENDANTS AND RESPONDENTS.

APPLICATION FOR WRIT OF CERTIORARI TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

I.

The petition of Richard L. Davey, a citizen of the United States, of full age of majority and domiciled in the City of Hoboken, County of Hudson and State of New Jersey, plaintiff in the cause entitled Richard

L. Davey *vs.* Delaware, Lackawanna and Western Railroad Company, a corporation, and Lehigh Valley Railroad Company, a corporation, jointly, severally or in the alternative, respectfully represents:

That in the said cause and matter, entitled Richard L. Davey *vs.* Delaware, Lackawanna and Western Railroad Company, a corporation, and Lehigh Valley Railroad Company, a corporation, jointly, severally or in the alternative, Number 7807 of the Docket of the Court of Errors and Appeals of the State of New Jersey, the Honorable Court of Errors and Appeals of the State of New Jersey, on the 15th day of October, 1928, rendered an opinion and decree, wherein a judgment of the New Jersey Supreme Court, striking out the complaint filed in the said New Jersey Supreme Court by your petitioner and dismissing his cause of action, was affirmed, Black, Campbell and Lloyd, JJ., and Judge Van Buskirk dissenting, as will appear by reference to a copy of said opinion and decree of the said Court of Errors and Appeals of the State of New Jersey, at R., 7.

II.

That the rule for affirmance of said judgment of the New Jersey Supreme Court against your petitioner was duly entered in the said Court of Errors and Appeals of the State of New Jersey on the 26th day of October, 1928, (R. 12), and that said Court of Errors and Appeals is the court of last resort of and for the State of New Jersey.

III.

Your petitioner further shows that the said cause entitled Richard L. Davey *vs.* Delaware, Lackawanna and Western Railroad Company, a corporation, and Lehigh Valley Railroad Company, a corporation, jointly, severally or in the alternative, is an action *in personam* for personal injuries growing out of petitioner's employment in a maritime contract, the work in which he was employed being maritime in its nature, and the injury being received, and the alleged tort committed, on the navigable waters at or near Staten Island, N. Y., in the New York harbor. The plaintiff bases his right of action on the clause in the Federal Judicial Code, Sections 24 and 256 (U. S. C. A. Title 28, Secs. 41 and 371), "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

IV.

The defendants moved in the New Jersey Supreme Court for an order striking out the Complaint filed therein by the plaintiff, your petitioner, and dismissing his suit on the ground that said Complaint "disclosed a cause of action for a maritime tort, cognizable exclusively in admiralty, and whereof the New Jersey Supreme Court has no jurisdiction" (R. 4). On this motion of the defendants, the said New Jersey Supreme Court made an order that the said Complaint of plaintiff, your petitioner, be stricken out

and that his cause of action be dismissed on the sole ground that it appeared from the face of the Complaint that the cause of action therein set forth was one sounding in maritime tort and exclusively within the admiralty jurisdiction of the United States of America (R. 5).

From this order, which is in the nature of a final judgment (R. 8), an appeal was duly taken to the Court of Errors and Appeals of the State of New Jersey, and said order and judgment was there affirmed, the opinion and decree being dated October 15th, 1928, and the rule for affirmance being actually entered on October 26th, 1928, as hereinabove mentioned.

V.

Your petitioner further shows that the Honorable Court of Errors and Appeals of the State of New Jersey erred in its judgment in affirming the order and judgment of the New Jersey Supreme Court, wherein it held

(*a*) that the New Jersey Supreme Court was without jurisdiction to entertain the cause of action *in personam* alleged by the plaintiff;

(*b*) that the New Jersey Workmen's Compensation Act (P. L. 1911, p. 134) barred a recovery by plaintiff at common law for a maritime tort;

(*c*) that the plaintiff did not seek a common law remedy in the Complaint filed in the said New Jersey Supreme Court, but a remedy under the Federal Employers' Liability Act;

(*d*) that the said New Jersey Supreme Court would be without jurisdiction to entertain the cause of action alleged by plaintiff, assuming that it were instituted under the Federal Employers' Liability Act;

(*e*) that the case of *Messel v. Foundation Co., 47 Sup. Ct. Rep. 695; 274 U. S. 427; 71 L. ed. 1135*, has no application to the case at bar;

(*f*) That an employee or servant who suffers injury upon a vessel in the navigable waters, when engaged in a maritime contract, or as the result of a maritime tort, cannot seek damages in the state courts or tribunals of the State of New Jersey in an action *in personam* under any circumstances;

(*g*) that the absence of a provision similar to Article 2315 of the Revised Civil Code of Louisiana, 1870, "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," in the statute law of the State of New Jersey distinguishes the case of *Messel v. Foundation Co., supra*, from that alleged by the plaintiff, and rendered the opinion in the *Messel case* inapplicable to the case at bar; and

(*h*) that the Federal Judicial Code, Sections 24 and 256 (U. S. C. A. Title 28, Secs. 41 and 371), "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it," does not protect the right of a servant, suitor, to proceed *in personam* in the New Jersey courts of common law against his master for damages sustained by rea-

son of the negligence of the master, on the navigable waters.

Petitioner respectfully shows that the questions which this Honorable court should decide are

FIRST: Whether or not a state court has jurisdiction *ratione materiæ* to hear and determine a suit *in personam* by a servant against his master, arising out of a tort committed on navigable waters;

SECOND: Whether or not a servant who is injured in work of a maritime nature, and growing out of a maritime contract, as a result of his master's negligence, may elect to proceed in a state court *in personam* for a common law remedy, under the "saving clause" in the Federal Judiciary Act, above quoted, "saving to suitors *in all cases* the right of a common law remedy, where the common law is *competent* to give it";

THIRD: Whether or not the plaintiff sought aught else but a common law remedy;

FOURTH: Whether or not, assuming that the plaintiff's remedy was under the Federal Employers' Liability Act, the courts of New Jersey still had jurisdiction by virtue of the terms of said Act. (Federal Employers' Liability Act, Section 6: "The jurisdiction of the courts of the United States, under this Act, shall be concurrent with that of the courts of the several states, and no case arising under this Act, and brought into any such court of competent jurisdiction, shall be removed to any court of the United States") (35 Stat. L. 66, as amended by 36 Stat. L. 291; 8 Fed. Stat. Ann., 2d Ed., 1370);

FIFTH: Whether or not the Workmen's Compensation Act of the State of New Jersey can and does extend to or affect an employe who is injured while engaged in work of a maritime nature, and as a result of a maritime tort;

SIXTH: Whether or not the purpose of the New Jersey Workmen's Compensation Act was to merely deprive servants of their common law remedy, or to substitute in its place and stead another form of remedy;

SEVENTH: Whether or not the lawmaking body of the State of New Jersey can legislate with respect to maritime torts under the constitution and statutes of the United States, so as to destroy and interfere with the general uniformity of the maritime law;

EIGHTH: Whether or not the case of *Messel v. Foundation Co., supra,* is applicable to, and controlling on, the courts of the State of New Jersey in the case at bar;

NINTH: Whether or not the absence of a statutory equivalent for Article 2315 of the Revised Civil Code of Louisiana, 1870, "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," distinguishes the case of *Messel v. Foundation Co., supra,* from a suit *in personam* in a common law court of a common law state, based upon a maritime tort committed by a master against his servant, since the provision of the Revised Civil Code of Louisiana, above quoted, is merely a

statutory equivalent of the common law remedy, and not a part of the Workmen's Compensation Act of the State of Louisiana; and

TENTH: Whether or not there is any essential difference between the Workmen's Compensation Act of the State of Louisiana (La. Laws 1914, Act 20) and the Workmen's Compensation Act of the State of New Jersey (P. L. 1911, p. 134), as affecting the jurisdiction of the courts, under Section 2315 of the Revised Civil Code of Louisiana, and under the common law in the State of New Jersey.

VI.

Your petitioner shews that these questions are solely questions of law, and that they have been decided in favor of the petitioner's present contention in a number of well-considered cases. The court has uniformly ruled that the state courts have always had jurisdiction of a cause of action against a master, shipowner, in contract or in tort, when he could be served personally with process and where money damages only were demanded, and that such right to proceed in the state court was not taken away by the grant in the Federal Constitution, but that the right to hear such cases, as well as others of maritime and admiralty jurisdiction, was given to the then constituted Federal Judiciary, and that where a common law remedy was sought, the jurisdiction of the admiralty and common law courts was concurrent; that the remedy here sought is one that is saved to suitors, to wit: the right to proceed *in personam* against the defendants, which remedy the common law is *competent* to give.

In *The Hamilton, 207 U. S. 398; 52 L. ed. 264,* this court said at page 404:

> "The grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789 (1 Stat. at L. 77, Chap. 20, Sec. 9) 'saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it' (Rev. Stat. Sec. 563, cl. 8; U. S. Comp. Stat. 1901, p. 457) leaves open the common law jurisdiction of the state courts over torts committed at sea. *This, we believe, has always been admitted.* (Citing cases.)"

In *Amer. Steamboat Co. v. Chace, 83 U. S. 522, 21 L. ed. 369,* this court ruled, at page 534:

> "Examined carefully, it is evident that Congress intended by that provision (9th Sec., Judiciary Act) to allow the party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy. * * * he may elect not to go into admiralty at all, and may resort to his common law remedy in the state courts. * * *"

In *Messel v. Foundation Co., 274 U. S. 427, 71 L. ed. 1135,* this court said, at page 432:

> "Section 2315 (Revised Civil Code of Louisiana, 1870) offers a remedy in the state court for any act whatever of man that causes damage to another and obliges him by whose fault it happened to repair it. That includes everything except what the Workman's Compensation Act bars from recovery under this general section. The Workman's Compensation Act does not bar from recovery suit for

> damages against another for a maritime tort. Clearly, therefore, suit for such a tort is not excluded from the jurisdiction of the state court under Section 2315, unless the Federal law forbids. To hold that the Federal law forbids would be to deprive the petitioner in this case of the right secured to him under the Judiciary Act of (September 24) 1789, (1 Stat. at L. 76, chap. 20) Section 9, as now contained in paragraph third of Section 256 of the Judicial Code, which gives exclusive jurisdiction in courts of the United States of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."
>
> "Section 2315 has been held by the supreme court of Louisiana to furnish the equivalent of the common law."

Further, in the same case, at page 434, this Honorable Court ruled:

> "As Messel has resorted to the state court, and there is nothing to prevent his recovery in the state court except the Workman's Compensation Act, which is inapplicable to his case in view of our decisions, the judgment of the supreme court of Louisiana must be reversed and the case remanded for further proceedings not inconsistent with this opinion."

True, the Honorable Court of Errors and Appeals of the State of New Jersey made mention of this statute involved in the *Messel case* (Revised Civil Code of Louisiana, 1870, Article 2315, "every act whatever of

man that causes damage to another obliges him by whose fault it happened to repair it"), and sought to base thereon a distinction, but your petitioner respectfully submits that the distinction is unsound, in the light of the fact that the Code provision, above quoted, is merely a statutory substitute in Louisiana for the common law remedy here sought. *Messel v. Foundation Co., supra; Gray v. New Orleans Dry Dock and Shipbuilding Co., 146 La. 826, 84 So. 109.* Such a statute would be unnecessary and, in fact, out of place in New Jersey, a common law state.

In *So. Pacific Co. v. Jensen, 244 U. S. 205, 61 L. ed. 1086,* this court ruled that the various states may not change the machinery of the common law with respect to maritime matters, and put in its place the procedure, foreign to the common law, outlined by social legislation such as the Workmen's Compensation Acts.

The law is definitely fixed that the "saving clause" in the Federal Judiciary Act above quoted permits a party to seek redress by proceeding *in personam* in the state court. The test is the competency of the common law, not the will or caprice of legislatures.

That for the reasons assigned, and for the protection of your petitioner's rights, and since this application is based upon the ground that the decision sought to be reviewed is in conflict in its declarations of law with those laid down by this Court, your petitioner submits that this Honorable Court should review the pleadings and law and pronounce judgment concerning the matters and things there raised.

Wherefore, in consideration of the foregoing premises, petitioner prays that a writ of certiorari issue

herein, commanding the Honorable Court of Errors and Appeals of the State of New Jersey to send up to this Court the record hereinabove mentioned, so that the same may be reviewed, and that this court may pronounce judgment herein, and that the errors committed by the Honorable Court of Errors and Appeals of the State of New Jersey be corrected, and that there be judgment in this Court, reversing the said opinion and judgment of the said Court of Errors and Appeals of the State of New Jersey, and that the said cause be remanded to, and reinstated in, the said state court, to be there proceeded on according to law, and your petitioner prays for all general and equitable relief as to this Honorable Court may seem meet.

DOUGAL HERR,
Attorney for Petitioner,
Plaintiff and Appellant.

Affidavit.

STATE OF NEW JERSEY,
County of Hudson, ss:

RICHARD L. DAVEY, being duly sworn according to law, upon his oath deposes and says:

1. I am the petitioner herein, and have read the foregoing petition, and the allegations of fact therein contained are true.

RICHARD L. DAVEY.

Sworn to and subscribed before me this 8th day of January, 1929.

[SEAL.] LOUIS F. BEACHNER,
Notary Public of New Jersey.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 628 219

RICHARD L. DAVEY, PETITIONER, PLAINTIFF AND APPELLANT,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, A CORPORATION, AND LEHIGH VALLEY RAILROAD COMPANY, A CORPORATION, JOINTLY, SEVERALLY, OR IN THE ALTERNATIVE, RESPONDENTS, DEFENDANTS AND RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

We are conscious of the fact that this Court is already overtaxed and would hesitate to ask this review were it not for our conviction that the doors of the courts of New Jersey have been closed to the petitioner herein and to many others in similar circum-

stances. Indeed, the effect of the decision sought to be reviewed is to shunt a great number of cases into the Federal courts while there is no valid reason why they cannot be entertained in the State courts of common law. This is not fair to the parties who may prefer and can better afford proceeding in the courts of their own State, nor is it entirely fair to the Federal courts, already overcrowded.

We respectfully submit that the Honorable Court of Errors and Appeals of the State of New Jersey has committed error in denying petitioner his day in Court, and in holding that the Common Law of New Jersey is not now competent to give petitioner a remedy, and that none of the Courts of the State of New Jersey have jurisdiction to entertain petitioner's case. We feel that the petitioner is entitled, under the Constitution and Statutes of the United States, to prosecute his action *in personam* against the respondents, seeking as he does a Common Law remedy.

I.

The Opinion of the Court Below.

The opinion in the Court of Errors and Appeals of New Jersey is not yet officially reported. It was filed on Oct. 15, 1928. Said opinion is copied in the record (R. 7.)

II.

Jurisdiction.

1. The statutory provision sustaining jurisdiction of this Court in the instant case is Sec. 237b, of the Judicial Code as amended Feb. 13, 1925 (43 Stat. 936).

2. The date of the judgment to be reviewed is Oct. 26, 1928. (R. 12.)

3. The nature of the case and the rulings below were such as bring the case at bar within the jurisdictional requirements.

(a) It is a suit *in personam* asking a common law remedy, against petitioner's master, for injuries sustained by petitioner as a result of Master's *Maritime Tort* (Complaint R. 1-3) (Opinion R. 7-8).

(b) The learned Court of Errors and Appeals of New Jersey ruled that the courts of New Jersey had no jurisdiction to entertain an action by a servant against his master, seeking a common law remedy for a maritime tort, since the passage of the New Jersey Workmen's Compensation Act (N. J. P. L. 1911, p. 134, as amended N. J. P. L. 1913, p. 302) (Opinion R. 7-11).

(c) The opinion of said Court of Errors and Appeals of New Jersey is contrary to the holding of this Court in Messel v. Foundation Company, 274 U. S. 427, and the distinction sought to be made by the Court below unwarranted.

(d) Cases sustaining jurisdiction.

1. Messel vs. Foundation Co., 274 U. S. 427.
2. Northern Coal & Dock Co. et al. vs. Strand et al., U. S. Sup. Ct. No. 41, Oct. Term 1928 (Decided Dec. 10, 1928).

III.

Statement of Case.

This suit is an action *in personam*. The petitioner filed his summons and complaint in the New Jersey Supreme Court, a Court of Common Law, in which he asked only a Common Law remedy, to wit, a judgment in that Court for money damages for the injuries he sustained while working on a tugboat of the defendants, or one of them. The petitioner bases his right on the negligence of the defendants and alleges that at the time of the injury the said tugboat *was being repaired* at the marine repair yard of the defendants, and was standing in the navigable waters of New York Bay, at or near said repair yard at West Brighton, on Staten Island, in the State of New York. Personal service of the defendants-respondents was had.

On the defendants' motion the said New Jersey Supreme Court made an order striking out petitioner's complaint and dismissing his cause of action on the sole ground that it appeared, from the face of the complaint, that the cause of action therein set forth was one sounding in maritime tort and exclusively within the admiralty jurisdiction of the United States of America. (R. 5.)

From this order of the Supreme Court which is reviewable, because of its nature, as a final judgment (R. 8) an appeal was duly taken to the Court of Errors and Appeals of the State of New Jersey where the order and judgment of the New Jersey Supreme Court

were affirmed, the said Court of Errors and Appeals of New Jersey ruling

FIRST: That prior to the enactment of the Workmen's Compensation Act of New Jersey (N. J. P. L. 1911, p. 134, as amended P. L. 1913, p. 302) a maritime tort in the nature of the one sued on in the present case could be sued on at common law or in the admiralty court at the option of the injured party.

SECOND: That when the Workmen's Compensation Act of New Jersey was enacted an employee was deprived of his common law remedy in a state court, except where notice of refusal had been given by the employee, according to the provision of the statute.

THIRD: That the Judicial Code of the United States, as contained in subdivision 3 of section 991 (U. S. C. S. 1916 Annotated, Vol 1, p. 764), "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," did not serve to leave open the jurisdiction of the New Jersey Courts of common law to entertain the case at bar because the remedy sought was that under the Federal Employers' Liability Act which is not a common law remedy but a purely statutory remedy created to meet the exigencies of modern industrial life. (R. 10.)

FOURTH: That this action was instituted under the Federal Employers' Liability Act.

FIFTH: That the New Jersey Courts have no jurisdiction to entertain this action assuming that it did come within the provisions of the Federal Employers' Liability Act.

SIXTH: That the case of *Messel v. Foundation Company, 274 U. S. 427, 71 L. ed. 1135* is not binding on the Courts of New Jersey because the same can be distinguished from the case at bar.

SEVENTH: That the distinction between the *Messel case, supra*, and the one at bar is that Louisiana, wherein the Messel case was presented, has a statute (Revised Civil Code of 1870, article 2315) "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," and that New Jersey *has no such statute.*

EIGHTH: That the New Jersey Workmen's Compensation Act works a surrender of the petitioner's rights to any other method, form or amount of compensation, or determination thereof, than as provided in section 2 of said Act.

NINTH: That the New Jersey Workmen's Compensation Act contains no provision similar to the Louisiana Revised Civil Code, article 2315 "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

TENTH: That an employee who suffers an injury upon a vessel in navigable waters as a result of a maritime tort cannot, under any circumstances, seek relief against his employer in the Courts of the State of New Jersey.

IV.

The Federal Questions Involved.

The petitioner contended in the State Courts that the remedy he sought was that common law remedy

saved to him by the Federal Judiciary Act, sec. 9 of Act of 1789, continued in Judicial Code in secs. 24 and 256 (U. S. C. A. Title 28, secs. 41 and 371). In dealing with this contention the learned Court of Errors and Appeals of New Jersey said:

> "The difficulty we have with this argument is that the Federal Employers' Liability Act, under which the case at bar was instituted, is not a common law remedy but a purely statutory remedy created to meet the exigencies of modern industrial life. It is in derogation of the common law and supersedes state law in respect of circumstances and relationships within its scope" (R. 10).

Petitioner did not seek relief under the Federal Employers' Liability Act nor contend for it for the reason that he was not engaged in Interstate Commerce at the time of the accident, the boat on which he was working being out of service for repair. But if the view injected into the controversy by the said Court be accepted, then jurisdiction of the State Courts to entertain this cause is assured by the terms of the Federal Employers' Liability Act itself, which provides:

> Sec. 6. * * * "The jurisdiction of the Courts of the United States under this Act shall be concurrent with that of the Courts of the several States, and no case arising under this Act and brought in any State Court of competent jurisdiction shall be removed to any Court of the United States". (35 Stat. L. 66, as amended by 26 Stat. L. 291) 8 Fed. Stat. Anno. 2nd ed. p. 1370.

It is therefore manifest that the State Court had ample jurisdiction in either instance, where the remedy sought was the pure common law remedy or the modified remedy under the Federal Employers' Liability Act.

In passing upon the case of *Messel v. Foundation Company, 274 U. S. 427, 71 L. ed. 1137*, the Court of Errors and Appeals of New Jersey, accepted the same as binding but sought to distinguish it from the case at bar. The basis of this distinction, according to the opinion of the learned Court of Errors and Appeals, was the existence of a provision in the Louisiana Revised Civil Code of 1870, Article 2315 "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." It was the absence of such a statutory declaration that prompted the learned Court below to state that the Messel case had no application to the case at bar.

Petitioner contends that the Louisiana Revised Code, Article 2315, above quoted, is nothing more or less than a statutory declaration of a common law remedy such as has existed in the State of New Jersey from its birth, and which common law is indeed the foundation stone upon which the jurisprudence of the State of New Jersey is built. In a common law State such a statutory declaration would be superfluous.

If the Federal Judiciary Act and Judicial Code, above quoted, saved to Messel the code equivalent of a common law remedy in the State of Louisiana how can it fail to save a real common law remedy in the common law State of New Jersey?

Lastly, the learned Court of Errors and Appeals of the State of New Jersey cited Section 8 of the Workmen's Compensation Act of New Jersey (P. L. 1911, p. 134, as amended P. L. 1913, p. 302) which provides that the implied agreement under said Act shall be a surrender by the parties thereto to any other method, form or amount of compensation or determination thereof than as provided in Section 2 of said Act. (R. 11.) The learned Court of Errors and Appeals did not notice that the Workmen's Compensation Act of the State of Louisiana (Laws of Louisiana 1914, Act. No. 20) contains decidedly similar provisions; indeed the latter act is even more specific since, by its very terms, it purports to apply to the repair of vessels, boats and other watercraft. (Act No. 20, sec. 2.)

If the Workmen's Compensation Act of Louisiana did not serve to take away the right of Messel to the equivalent of a common law remedy it is impossible to see how the Workmen's Compensation Act of the State of New Jersey could bring about such a result.

It appears very clearly throughout the entire record that the petitioner relied upon the saving clause in the Federal Judicial Code, above quoted, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

V.

Authorities Relied Upon by Petitioner in Support of His Application.

This Court has in a number of well considered cases, and in every case where the question was presented,

held that the common law remedy saved to suitors by the Federal Judiciary Act as continued in the Federal Judicial Code is the right to proceed *in personam* against the defendant, which remedy the common law is competent to give.

In the case of *American Steamboat Company* v. *Chace*, 83 U. S. 522, 21 L. ed. 369, this court considered the saving clause of the Judiciary Code "saving to suitors in all cases the right of the common law remedy, where the common law is competent to give it." That case was a suit *in personam* in a State Court against a steamboat company for the recovery of damages for the death of plaintiff's intestate. The defendant pleaded that the saving clause in the Federal Judiciary Act did not apply. This Court held the contention of the defendant to be unsound, and, through Mr. Justice Clifford, stated at page 372:

> "Questions of this kind cannot arise in suits *in rem* to enforce maritime liens, and the common law is not competent to give such a remedy, and the jurisdiction of the Admiralty Courts in such cases is conclusive. Such a question can only arise in personal suits where the remedy, in two jurisdictions, is without any substantial difference. Examined carefully, it is evident that Congress intended by that provision to allow the party to seek redress in the Admiralty, if he saw fit to do so, but not to make it compulsory in any cases where the common law is competent to give him a remedy. Properly construed, a party under that provision may proceed *in rem* in the Admiralty if a maritime lien arises, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into Ad-

> miralty at all, *and may resort to his common law remedy in the State Courts.*"

In the case of *Leon v. Galceron, 78 U. S. 185, 20 L. ed. 74*, the Court also had under consideration the construction of the same clause in the Judiciary Act. There this Court held:

> "When the suit is *in rem* against the ship the original jurisdiction of the controversy is exclusively in the District Court; but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the District Court, or he may at his election proceed in an action at law * * * in a State Court as in other causes of action cognizable in the State Courts exercising jurisdiction in Common Law cases."

In the case of *Knapp v. McCaffery, 177 U. S. 638*, in which case the same question was involved, the Court said at p. 648:

> "If, upon the other hand, the cause of action be not one in which a Court of Admiralty has jurisdiction or if the suit be *in personam* against an individual defendant with an auxiliary attachment against a particular thing or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law and within the saving clause of the statute of a common law remedy."

This rule was also applied in the *Glide, 167 U. S. 606; Johnson's Chicago Elevator, 119 U. S. 388; The Hine v. Trevor, 71 U. S. 555; 18 L. ed. 451, 456; Lotta-*

wanna, 21 Wall. 558, 22 L. ed. 654; La Bourgegne, 210 U. S. 95, 52 L. ed. 973.

In *The Hamilton, 207 U. S. 398, 52 L. ed. 264,* this Court said, through Mr. Justice Holmes, at page 404:

> "The grant of admiralty jurisdiction, followed and construed by the judiciary act of 1789 (1 Stat. at L. 77, chap. 20, sec. 9), 'saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it' (Rev. Stat. Sec. 563, cl. 8, U. S. Comp. Stat. 1901, p. 457), leaves open the common law jurisdiction of the state courts over torts committed at sea. This, we believe, always has been admitted. Martin *v.* Hunter, 1 Wheat. 304, 337; 4 L. ed. 97, 105; The Hine *v.* Trevor (The Ad. Hine *v.* Trevor), 4 Wall. 555, 571; 18 L. ed. 451, 456; Leon *v.* Galceran, 11 Wall. 185; 20 L. ed. 74; Manchester *v.* Massachusetts, 139 U. S. 240, 262; 35 L. ed. 159, 166; 11 Sup. Ct. Rep. 559."

In *Benedict on Admiralty, 5th Edition, Section 20, Volume I, page 24,* we find the following text:

> "The Constitution of the United States provides that the judicial power of the United States shall extend to 'all cases of Admiralty on the Maritime jurisdiction.' This does not mean that every case touching a ship or her affairs must necessarily be heard by a Federal Court sitting in Admiralty; the common law courts always had jurisdiction in a cause of action against a ship owner in contract or in tort when he could be reached *personally and money damages only were demanded.* That

right was not taken away by the grant in the Constitution, but the right also to hear such cases, as well as other cases of admiralty jurisdiction was given to the newly constituted Federal Judiciary. The jurisdiction of the Admiralty and the common law Courts is therefore to a certain extent, concurrent. The common law jurisdiction, when concurrent with Admiralty jurisdiction, may be exercised by State Courts."

In the case of *Bockhop v. Phœnix Transit Co., 97 N. J. L., 514*, expounded by the Court of Errors and Appeals in the instant case, the Court of Errors and Appeals ruled that if the occurrence of which the plaintiff received his injuries was a maritime tort the Federal courts had sole jurisdiction (Opinion, p. 3, l. 18). It should be noticed that the saving clause in the Federal Judicial Code was not passed upon or discussed in the opinion in the Bockhop case.

In the case of *March v. Vulcan Iron Works, 102 N. J. L., 337*, the New Jersey Court of Errors and Appeals set aside an award made to the plaintiff under the Workmen's Compensation Act on the ground that the plaintiff had received his injuries on the navigable waters and that the Workmen's Compensation Act could not extend to his employment. The learned Court of Errors and Appeals of New Jersey thereby came in line with the case of Southern Pacific Co. *v.* Jensen, 244 U. S., 205; 61 L. Ed. 1086. Thus upon the authority of two cases which cannot be reconciled with the established law of this Court, or with

each other, the learned Court of Errors and Appeals now holds that the plaintiff is without remedy in any court of the State of New Jersey.

We know that the New Jersey Workmen's Compensation Act and other legislation creating new forms of legal machinery foreign to the common law cannot apply to maritime relations or controversies. *Southern Pacific Co. v. Jensen, supra.* Indeed, this was finally recognized by the State of New Jersey. *March v. Vulcan Iron Works, 102 N. J. L., 337.*

We also know that the purpose of the various Workmen's Compensation Acts was not merely to deprive a worker of his common-law remedy, but to substitute for it, largely because of the harshness of the common-law remedy on the worker, another and more sure form of relief for injuries sustained while at work.

In *Resigno v. F. Jarka Co., 248 N. Y., 225,* the New York Court of Appeals considered the New Jersey Workmen's Compensation Act (P. L. N. J., 1911, p. 134, as amended P. L. N. J., 1913, p. 302), and, at page 234, said, per Cardozo, C. J.:

> "The Appellate Division held that the remedy under that act had been supplanted by the adoption in New Jersey of a Workmen's Compensation Act, awarding the usual system of insurance to workmen subject to its provisions. We think the holding is erroneous. Resigno was injured while engaged in maritime work upon navigable waters. There was no power in the Legislature of New Jersey to substitute a system of workmen's compensation for the

> right of action for damages that was his under maritime law. There was a like defect of power to substitute such a system for the then existing right of action for the use of his survivors. The point was expressly ruled in Warren *v.* Morse Dry Dock & Repair Co., 235 N. Y. 445, 139 N. E. 569; *Id.*, 262 U. S. 756, 43 S. Ct. 703, 67 L. Ed. 1217. * * * A different question would be here if the Legislature had attempted to repeal the death statute altogether. *What is attempted was "not to abolish every remedy,* but to substitute one remedy for another." Warren *v.* Morse Dry Dock & Repair Co., *supra.* 'To the extent that the substitution of a new remedy is ineffective, the old one survives."

How can we therefore say that this petitioner who suffers as a result of a maritime tort has no recourse to the State courts because the Workmen's Compensation Act, which cannot give him relief, deprives him of the common law remedy, which has existed from earliest times? The State Legislature never intended such a result. Clearly they intended to substitute a new form of relief and not to deprive maritime workers of common law relief in State courts of common law when they could put nothing in its place.

In *Messel v. Foundation Co., 274 U. S., 427, 71 L. Ed., 1135,* the facts and circumstances under which the plaintiff there received his injuries, as well as the relationship existing between him and his employer, the defendant, were identical with those of the case at bar. There, as in this case, Messel was denied relief in any of the courts of his home State, Louisiana, and,

on certiorari to this Honorable Court, it was held that the rulings of the Courts of Louisiana were incorrect and the same was remanded by this Court for new trial.

Messel invoked the provisions of Article 2315 of the Louisiana Revised Code as the basis of his relief, and this Court ruled that Article 2315 furnished the equivalent of the common law.

This Court ruled, through Mr. Chief Justice Taft, at page 432:

> "Section 2315 offers a remedy in the state court for any act whatever of man that causes damages to another and obliges him by whose fault it happened to repair it. That includes everything except what the Workmen's Compensation Act bars from recovery under this general section. The Workmen's Compensation Act does not bar from recovery suit for damages against another for a maritime tort. Clearly, therefore, suit for such a tort is not excluded from the jurisdiction of the State court under Sec. 2315 unless the Federal law forbids. To hold that the Federal law forbids would be to deprive the petitioner in this case of the right secured to him under the Judiciary Act of (September 24) 1789, (1 Stat. at L. 76, chap. 20) Sec. 9, as now contained in paragraph third of Sec. 256 of the Judicial Code, which gives exclusive jurisdiction in courts of the United States of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Continuing, on page 434, this Court said:

> "As Messel has resorted to the state court, *and there is nothing to prevent his recovery in the state court except the Workmen's Compensation Act, which is inapplicable to his case in view of our decisions*, the judgment of the Supreme Court of Louisiana must be reversed and the case remanded for further proceedings not inconsistent with this opinion."

It is respectfully submitted that for the foregoing reasons a writ of certiorari should issue herein as prayed for in petitioner's petition.

Respectfully submitted,

DOUGAL HERR,
Counsel for the Petitioner, Plaintiff and Appellant, Hudson Trust Company Building, 51 Newark Street, Hoboken, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 628 219

RICHARD L. DAVEY,
Petitioner, Plaintiff and Appellant,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation, and LEHIGH VALLEY RAILROAD COMPANY, a Corporation, Jointly, Severally, or in the Alternative,
Respondents, Defendants and Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 628

RICHARD L. DAVEY,
Petitioner, Plaintiff
and Appellant,

versus

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation, and LEHIGH VALLEY RAILROAD COMPANY, a Corporation, Jointly, Severally, or in the Alternative,
Respondents, Defendants
and Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Delaware, Lackawanna & Western Railroad Company, a corporation, and Lehigh Valley Railroad Company, a corporation, who are the respondents to the petition for writ of certiorari now presented to this Honorable Court, and

who were the defendants and respondents in the courts below, respectfully oppose the issuance of the writ prayed for by the petitioner and contend that said petition should be dismissed by this Honorable Court, with costs to said respondents. On behalf of said respondents, we respectfully submit that the decision of the Honorable Court of Errors & Appeals of the State of New Jersey, here sought to be reviewed, upon the questions to said Honorable Court below presented, was in all respects reasonable, proper, logical and in accordance with applicable and controlling law, and is justifiable and sustainable by and under the Constitution and laws of the United States and of the State of New Jersey and the decisions of this Honorable Court and of the courts of the State of New Jersey in cases factually similar to the instant cause.

I.

The Opinion of the Court Below.

As has been correctly stated in the brief in support of the petition (P. B. 2), the opinion of the New Jersey Court of Errors & Appeals has not yet been officially reported, but is copied at length in the record (R. 7). It was rendered October 15, 1928 and is (unofficially) reported in 143 Atlantic Reporter, 313.

We submit that an accurate analysis of said opinion below justifiably leads to the inference that it is based upon the following grounds:

> (a) That the petitioner as an employee of the respondents or one of them, was a pipe fitter engaged in the repair of a vessel owned by the respondents, or one of them, upon navigable waters, and that, in

the course of his said employment, petitioner sustained injuries resulting from alleged negligent failure of his employer or employers to supply him with proper instrumentalities for his work and to use reasonable care in the inspection thereof, and that the complaint inferentially alleged that the cause arose in interstate commerce (R. 8).

(b) That the Workmen's Compensation Act of New Jersey deprived an employee of the common law remedy in a state court referred to in the third subdivision of section 371, Title 28, U. S. Code—The Judicial Code of the United States (R. 10).

(c) That the remedy under the Federal Employers' Liability Act (U. S. Code, Title 45, ch. 2, section 51) is not a common law remedy within the sense of the "saving clause" in section 371, subdivision 3 of the Judicial Code of the United States last above referred to (R. 10).

(d) That the Merchant Marine Act (U. S. Code, Title 46, ch. 18, section 688) is not applicable to the instant cause, for the reason that neither a seaman nor a stevedore is here involved (R. 9-10).

(e) That *Messel* v. *Foundation Company*, 274 U. S. 427, is distinguishable from and not controlling of the instant cause (R. 10-11).

II.

The Federal Questions Involved.

The respondents respectfully submit that the instant petition for writ of certiorari raises the following Federal questions for determination by this Honorable Court:

(a) Is the Workmen's Compensation Act of the State of New Jersey (2 Cum. Supp. Comp. St. 3868),

in depriving petitioner of a common law remedy in the courts of that state for a maritime tort, in conflict with the Constitution or laws of the United States?

(b) Is petitioner entitled to a remedy in the courts of New Jersey under any or all of the following Federal laws:

(1) Judicial Code of the United States (U. S. Code, tit. 28, sec. 371, subdivision 3)?

(2) The Federal Employers' Liability Act (U. S. Code, tit. 45, ch. 2, sec. 51)?

(3) The Merchant Marine Act (U. S. Code, tit. 46, ch. 18, sec. 688)?

III.

Summary of Argument.

1. The New Jersey Workmen's Compensation Act abrogates any and all common law remedy in the courts of that state as between servant and master for injuries sustained in and arising out of his employment.

N. J. Workmen's Compensation Act, 2 Cum. Supp. Comp. Stat. (N. J.) 3871, Section 2, par. 8 & 9—P. L. 1911, ch. 95, at p. 136;

Sexton v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affd. 86 N. J. Law 701;

Bockhop v. *Phoenix Transit Co.*, 97 N. J. Law 514;

Raymond v. *Chicago, Milwaukee & St. Paul Railway Co.*, 243 U. S. 43;

New York Central Railroad Co. v. *White*, 243 U. S. 188;

Mountain Timber Company v. *Washington*, 243 U. S. 219;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205.

2. The New Jersey Workmen's Compensation Act, in so abrogating common law remedy as between master and servant, is not in conflict with the Constitution or laws of the United States.

N. J. Workmen's Compensation Act, 2 Cum. Supp. Comp. Stat. (N. J.) 3868;
Sexton v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affd. 86 N. J. Law 701;
Hawkins v. *Bleakly*, 243 U. S. 210;
Grant Smith-Porter Ship Company v. *Rohde*, 257 U. S. 469;
Middleton v. *Texas Power & Light Company*, 249 U. S. 152.

3. The remedies provided by the Federal Employers' Liability Act are not common law remedies within the "saving clause" of subdivision 3 of section 371 of tit. 28, U. S. Code—The Federal Judicial Code.

Federal Employers' Liability Act (U. S. Code, Title 45, ch. 2, sec. 51);
Mondou v. *New York, New Haven & Hartford Railroad Co.*, 223 U. S., p. 1;
Seaboard Air Line Railroad Co. v. *Horton*, 233 U. S. 492;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205;
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149;
Washington v. *Dawson & Co.*, 264 U. S. 219.

4. Petitioner's complaint in the New Jersey Supreme Court does not set forth a cause of action cognizable under the Federal Employers' Liability Act.

Complaint (R. 1-3);
Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556;
Chicago, B. & Q. R. Co. v. *Harrington*, 241 U. S. 177;
Southern P. Co. v. *Industrial Acci. Com.*, 251 U. S. 259;
Industrial Acci. Co. v. *Davis*, 259 U. S. 182.

5. The New Jersey Workmen's Compensation Act could have afforded petitioner a remedy.

N. J. Workmen's Compensation Act, 2 Cum. Supp. Comp. Stat. (N. J.) 3868;
Western Fuel Co. v. *Garcia*, 257 U. S. 233;
Grant Smith-Porter Ship Company v. *Rohde*, 257 U. S. 469;
Millers' Indemnity Underwriters v. *Braud*, 270 U. S. 59;
T. Smith & Son v. *Taylor*, 276 U. S. 179.

6. If petitioner's complaint below did not allege *prima facie* a cause of action under the Federal Employers' Liability Act, and if the employment in which he was engaged at the time he was injured was not a matter of purely local concern, the regulation whereof by State enactment would occasion no interference with the uniform operation of the maritime law in its international and interstate relations, petitioner, not being a seaman within the meaning of the

Merchant Seamen's Act, could not have properly invoked the jurisdiction of the New Jersey Supreme Court.

Merchant Seamen's Act (U. S. Code, tit. 45, ch. 2, sec. 51);

International Stevedoring Co. v. *Haverty*, 272 U. S. 50;

Northern Coal & Dock Co. v. *Strand* (U. S. Supreme Court), 73 L. ed. advance, p. 99.

IV.

Argument.

The variety of questions raised by the petition for writ of certiorari now coming before this Honorable Court in this cause, invoking, as they do, the interpretation of several Federal and State laws, requires to some extent at least, the employment of an experimental method in solving the problems involved in a correct and logical interpretation of the various Federal and State decisions which have heretofore had to do with the statutory enactments which would seem to have a bearing upon the matter now before the Court. Starting, therefore, with the primary relationship disclosed by the petitioner's original complaint as obtaining between the parties, the law of master and servant would seem to invite an inspection. Viewing the law applicable to such a relationship from the State standpoint alone, as of the time of the accrual of the cause of action, if any, to petitioner, and leaving aside, for the moment, consideration of the locus of the alleged tort, we find the field of right and liability as between master and servant in the State of New Jersey, exclusively occupied by the Workmen's Compensation Act of that state. In considering

that act, it must be recognized that it provides two alternative remedies, presented under the two main subdivisions of the act itself. The first main subdivision thereof, known as Section 1, (P. L. 1911 N. J., p. 134) and in the act itself entitled, "Compensation by Action at Law", affords an employee, injured in the course of his employment, a remedy at law in the State courts, where the injury can be predicated upon negligence of the employer as its natural and proximate cause, but limits a remedy by such means by the abolition of several of the defenses which, under such an action at law prior to the adoption of the act, would have been available to the employer, thereby substituting for the common law remedy available under the circumstances formerly, a purely statutory remedy as provided in the act. Section 2 of this statutory creation (P. L. 1911 N. J., p. 136) entitled in the act itself, "Elective Compensation", provides that where the employer and employee shall expressly or impliedly agree that both parties shall be bound by the provisions of said second section of said act, compensation shall be awarded to the employee for injuries sustained arising out of and in the course of his employment, in accordance with a fixed schedule of admeasurement (P. L. 1911 N. J., p. 137) and irrespective of negligence on the part of the employer. This second section of the act, similar to cognate provisions in acts of other states adopted about the same time, creates, as it is commonly described, a remedy by commission under statutory schedule, entirely foreign to the common law remedy which would otherwise be available.

It is to be noted that the said section 2 further provides that the agreement between the employer and employee above referred to as constituting the basis for the application of the act, shall be a complete surrender by the parties

of their rights to any other method, form or amount of compensation (P. L. 1911 N. J., ch. 95, sec. II, par. 8), and that every contract of hiring made subsequent to the date of taking effect of said act, shall be deemed to have been made with reference to the provisions of section 2 of the act, unless prior to any accident there be an express contract in writing to the contrary, or a written notice from either party to the other prior to the accident, that the provisions of section 2 shall not apply (P. L. 1911, N. J., ch. 95, sec. II, par. 9, p. 136).

An analysis of the Act referred to, and here discussed, will indicate that, in any given situation where a contract of employment was entered into after the effective date of said Compensation Act and in the absence of notice between the parties pursuant to the act to the contrary, the provisions of Section 2 of the New Jersey Workmen's Compensation Act constitute the exclusive source of remedy to an injured employee against his employer in the State of New Jersey, subject, of course, to the applicability of supervening Federal law in particular situations, which are to be discussed below herein. As was natural, the constitutionality of this act was raised in the State of New Jersey, and by its courts determined favorably, the leading case with reference to the question being that of *Sexton* v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affirmed 86 N. J. Law 701, the authority and conclusiveness of the decision wherein being recognized by this Court in several decisions, among which are:

Sexton v. *Newark District Telegraph Co.*, 84 N. J. Law 85, affd. 86 N. J. Law 701;

Raymond v. *Chicago, Milwaukee & St. Paul Railway Co.*, 243 U. S. 43;

New York Central Railroad Co. v. *White*, 243 U. S. 188;
Mountain Timber Company v. *Washington*, 243 U. S. 219;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205;
Western Fuel Co. v. *Garcia*, 257 U. S. 233.

Advancing a step further in our analysis of the situation from an experimental standpoint, let us apply the instant facts to the New Jersey Workmen's Compensation Act, for the purpose of ascertaining, *first*, whether the provisions of the act last mentioned are broad enough to cover the facts now before the Court, as set forth in petitioner's complaint in the New Jersey Supreme Court, and *next*, whether, in the light of existing Federal law, the provisions of the New Jersey Workmen's Compensation Act could be properly extended without conflict to cover the situation in question. Petitioner's employment was that of a pipe fitter (R. 3), whether a purely marine pipe fitter or a general pipe fitter, habitually employed upon land as well as upon vessels, does not appear. His employer or employers was one or were both of two railroad corporations, the respondents herein (R. 2-3). The complaint alleges that the said respondents were engaged in interstate commerce (R. 2). That allegation immediately reminds us that Congress has prescribed a remedy, under its Constitutional power to regulate commerce, to injured employees against railroad employers, where, at the time of the injury, the employment within which the same actually arose was the mutual engagement on the part of both employer and employee in interstate commerce (U. S. Code, tit. 45, ch. 2, section 51). Both the courts of New Jersey and of the United States, and particularly this Honorable Court, have, in carefully considered opinions, interpreted the provisions of the Fed-

eral statute last referred to as requiring that it can only be invoked where both employer and employee are, in the operation out of which the injury arose, engaged in interstate commerce, and a complaint which fails to set forth such facts is demurrable.

The original judgment in this cause was obtained upon a motion to strike the complaint, which is the modern New Jersey equivalent for a general demurrer (*Savage* v. *Public Service R. Co.*, 95 N. J. Law 432; *Shaedel* v. *Liberty Trust Co.*, 99 N. J. Law 380). In making such a motion, the moving party is deemed to admit the truth, for the purpose of the motion only, of all of the allegations of the complaint, and the legal inferences justifiably to be drawn therefrom. The question suggests itself, therefore: Does the allegation contained in the complaint that the respondents were engaged in interstate commerce, coupled with the allegation that the employee was engaged in repairing a vessel standing on navigable waters off a marine repair yard, constitute the equivalent of an allegation that both the employer and employee were, at the time the injuries were sustained, engaged in interstate commerce? We respectfully submit that it does not, upon the authority of the following decisions of this Court:

Shanks v. *Delaware L. & W. R. Co.*, 239 U. S. 556;

Chicago, B. & Q. R. Co. v. *Harrington*, 241 U. S. 177;

Southern P. Co. v. *Industrial Acci. Com.*, 251 U. S. 259;

Industrial Acci. Com. v. *Davis*, 259 U. S. 182.

Referring particularly to the case last cited, we find that the Court therein was confronted with the necessity of de-

termining whether the employment involved was in interstate commerce. The employee was injured while working in the general repair shops of the railway company upon an engine that had been employed in interstate commerce, and which was destined to be so employed again. This Court, in determining that the employment was not in or inseparably a part of interstate commerce and therefore not within the purview of the Federal Employers' Liability Act, said, through Mr. Justice McKenna (at p. 187):

> "The Federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad, and those employed in them, are accessories to that movement, —indeed, are necessary to it; but so are all attached to the railroad company,—official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the employment to the actual operation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideraton of degrees, and the test declared, that the employee, at the time of the injury, must be engaged in interstate transportation or in work so closely related to it, as to be practically a part of it, in order to displace state jurisdiction and make applicable the Federal act. * * * But equipment out of use, withdrawn for repairs, may or may not partake of that character, according to circumstances; and among the circumstances is the time taken for repairs,—the duration of the withdrawal from use. Illustrations readily occur. There may be only a placement upon a sidetrack or in a roundhouse,—the interruption of actual use, and the return to it, being of varying lengths of time; or there may be a re-

> moval to the repair and construction shops, a definite withdrawal from service and placement in new relations,—the relations of a workshop,—its employments and employees having cause in the movements that constitute commerce, but not being immediate to it."

In the case at bar, the equipment in question was a tugboat (R. 2) and the employee, a pipefitter, was engaged in "*repairing and refitting*" said vessel (R. 3). The employment, therefore, must be determined from a reasonable interpretation of these critical words, i. e. "repairing and refitting", as applied to the "tugboat" involved. Applying the test embodied in Mr. Justice McKenna's opinion as above quoted to "repairing and refitting" a "tugboat" used in connection with a repair yard, and allowing for all reasonable inferences and deductions from the words examined, the conclusion is irresistable that the employment referred to was not in interstate commerce and the Federal Employers' Liability Act therefore, eliminates itself from applicability.

If this question is to be answered in the affirmative, however, that is to say, if the allegations of the complaint are to be deemed sufficient on their face, to state a cause of action which, without more, would be within the provisions of the Federal Employers' Liability Act, it may, we submit, with propriety then be asked, are there any other elements embraced within the allegations which in themselves are to be deemed sufficient to exclude the applicability of the act from the case?

We now refer particularly to the allegations of the complaint which allege that the employment was on shipboard, the work was that of repairing and the vessel itself was upon navigable waters of the United States. These facts,

we submit, are tantamount to the setting forth of a maritime tort (*Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52), which, without more, would create in the petitioner, an alternate remedy, either *in rem* or *in personam* in admiralty or *in personam* at common law, provided, however, there subsisted in the courts of New Jersey, under the "saving clause" of the Judiciary Act, a common law remedy available to the petitioner under the circumstances, competent to afford relief.

At this juncture, we revert to the fact that the New Jersey Workmen's Compensation Act, in abolishing the common law remedy of a servant against his master, at least where no agreement or notice had been entered into or given, precluded the application of the provisions of section 2 of the act, to the employment. This situation arose in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, wherein this Honorable Court determined that under a maritime contract of employment, where the employee sustained injury in the course of his employment, and, in the particular state in question, a compensation law existed which supplanted the common law remedy theretofore available, the saving clause of the Judiciary Act did not apply, and nevertheless, further, decided that neither the Federal Employers' Liability Act nor the State Compensation Act in question afforded any remedy to the injured party because of the maritime nature of the employment, and locus of the tort, which created exclusive jurisdiction in the United States District Courts in admiralty.

In connection with the case last cited, the date of that decision is significant when compared with the date of the amendment shortly thereafter of the "saving clause" of the Judiciary Act referred to. The Jensen case was decided by this Court May 21, 1917. On October 6, 1917, not quite six

months after the Jensen decision, Congress amended the Judiciary Act, particularly the "saving clause", by adding to the clause as it originally stood, the words, "and to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States, which rights and remedies, when conferred by such laws, shall be exclusive." Can the reason underlying the adoption of this amendment be properly deduced as being aught else than an attempt to ameliorate conditions similar to those in which the respondent in the Jensen case found himself under the decision of this Court? We respectfully submit that any other inference would be justly chargeable with unreasonableness. Referring again, however, to the Jensen decision, we find that it was not confined to State Workmen's Compensation acts alone, but that the rule enunciated in the opinion of the Court, embraced both the Federal Employers' Liability Act and State Compensation acts within its scope and excluded the application of either from the facts underlying the case. If, therefore, Congress had in mind the Jensen case in adopting the amendment to the "saving clause" of the Judiciary Act, it must have taken cognizance of both the Federal Employers' Liability Act and State Compensation laws, and the failure of the amendment to include, as a further addition to the "saving clause", the saving of a remedy under the Federal Employers' Liability Act, would seem in all reason to have been intentional on the part of Congress, and to justify the assumption that Congress had no intention of attempting to effect by statutory enactment a change in the rule and doctrine enunciated in the Jensen case.

Shortly thereafter, however, this Honorable Court decided the case of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, wherein it declared that the said amendment of October 6, 1917, of the saving clause of the Judiciary Act was unconstitutional, and it recognized the position taken in the Knickerbocker Ice case with approval in its decision in *Washington* v. *Dawson & Co.*, 264 U. S. 219. The amendment to the said "saving clause", having thus been declared unconstitutional, became null and void and the "saving clause" was restored to the condition and effect in which it was before the amendment was added, thus reaffirming as controlling law, the decision in *Southern Pacific Co.* v. *Jensen*.

We respectfully submit, therefore, that the jurisdiction of the New Jersey Supreme Court to entertain the petitioner's suit was sustainable neither by the "saving clause" of the Judiciary Act in the light of the effect of the New Jersey Compensation Act upon the former common law of New Jersey theretofore applicable, nor by the Federal Employers' Liability Act. We must, therefore, cast about further in the endeavor to find another Federal law, because there is no further State law pertinent to the facts under which the entertainment by the New Jersey Supreme Court of petitioner's suit might be justified. We find, therefore, a further act commonly known as the Merchant Marine Act (U. S. Code, tit. 46, ch. 18, sec. 688) whereby Congress, in the exercise of its constitutional powers to regulate commerce, and for the purpose of codifying more uniformly the maritime law applicable to those who are engaged in such commerce, and incidentally, it would seem, with the ultimate object of encouraging the building up of the United States merchant marine (*Merchant Marine Act*—U. S. Code, tit.

46, ch. 24), provided in substance that any seaman who was injured during the course of his employment might proceed at law in either a State court or a Federal District court in the district in which he sustained injuries, against his employer, to recover damages for the injuries sustained, and the act further provided that all of the provisions of the Federal Employers' Liability Act should be deemed to have been re-enacted into and to form a part of the said Merchant Marine Act, and to be applicable to causes of action within the scope of the act last mentioned. Fitting the facts in the instant case to the remedial structure of the Merchant Marine Act, let us see whether the statute is apt to afford a remedy. This would seem to narrow the question finally down to this: Was the petitioner in this cause a "seaman" within the meaning of the term as used in the Merchant Marine Act? The word "seaman" as used in said act has been presented for interpretation to this Honorable Court before, and this Court has extended the scope of the term to include individuals more generally referred to as stevedores (*International Stevedoring Co.* v. *Haverty*, 272 U. S., 50; *Northern Coal & Dock Co.* v. *Strand* (U. S. Supreme Ct.), 73 L. ed. adv., p. 99). In the most recent decision of this Court which has come to our attention on the subject, that of *Northern Coal & Dock Co. et als.* v. *Strand*, decided December 10, 1928, and thus far reported in 73 L. ed. (adv., p. 99), this Court, following and approving *International Stevedoring Co.* v. *Haverty* (*supra*), declared that, within the intendment of the Merchant Marine Act, "seaman" is to be taken to include stevedores employed in maritime work on navigable waters. We respectfully submit that despite the rather broad extension of interpretation effected by the decisions in the last two cited cases, the petitioner

in the instant case could not, without violence to the English language, be deemed to be a seaman within the intendment of the Merchant Marine Act. We are confined to the complaint as the sole source of ascertaining who and what the petitioner was. He is therein described as a pipefitter (Complaint, R. 3), and we have heretofore adverted to the fact that it does not appear whether he was a purely marine pipefitter or a pipefitter of the general type, analogous in many ways to a plumber. He was pursuing his employment in repairing the vessel named in the complaint. Whether the vessel was actually under way while he was making the repairs, does not appear, but the inference would seem to be justifiable that it was either riding at anchor or moored to a dock. It was a tugboat, not an ocean-going vessel nor a vessel of the type or size which would justify the inclusion, in its regular complement of crew, of a pipefitter. The vessel belonged at, and apparently was used in connection with a marine repair yard operated by the respondents or one of them (Complaint, R. 2). The assumption seems justifiable that this pipefitter was one of several workers ordinarily operating in and in connection with the marine repair yard, that is, upon land, and that he had further been sent aboard the vessel from the shops for the purpose of making the repairs in question. If we adopt the conclusion that the petitioner in this cause was *not* a seaman within the intendment of the Merchant Marine Act, it may be properly asked, in what forum and under what law would a remedy have been available to him? Despite the decisions of the New Jersey courts, particularly *Coon* v. *Kennedy*, 91 N. J. Law 100, affirmed, 91 N. J. Law 598; *O'Brien* v. *Scandinavian-American Line*, 94 N. J. Law 244; *Bockhop* v. *Phoenix Transit Co.*, 97 N. J. Law 514, and *March* v.

Vulcan Iron Works, 102 N. J. Law 337, to the effect that where the locus of the injury was on navigable waters, the State Compensation Act was inapplicable and admiralty jurisdiction was exclusive, we can discover no word in the Workmen's Compensation Act itself which confines the operation of the act to land employments or non-maritime injuries. It is perfectly evident from a study of the New Jersey decisions last cited that the ground upon which the compensation act was held to be inoperative in cases of maritime injury was the assumption of the supremacy of the Federal law with reference to matters maritime. We recognize the rule, to be gleaned from many of the decisions of this Court, that, if there remains under the State law a common law remedy, an injured suitor, in cases of maritime tort, in proceeding in *personam*, may elect as between the Federal courts in admiralty and the State courts at common law in seeking his remedy. If, therefore, our contention is sound that the New Jersey Workmen's Compensation Act abolished a common law remedy in the State Court within the intendment of the "saving clause" in question, then, the New Jersey decisions last referred to are sound as to the exclusiveness of the Federal jurisdiction. If, however, our said conclusion is not sustainable, then the State Compensation Act left a residuum of common law remedy available which could be invoked by the petitioner in this cause. If, on the other hand, it is to be justifiably inferred from the allegations of the complaint that a cause of action within the Federal Employers' Liability Act was thereby stated, then the "saving clause" would not apply, but the petitioner could, nevertheless, seek relief in the State forum under the authority of the Federal act. If, however, further, the complaint is *not* to be deemed to have set forth a cause

of action cognizable under the Federal Employers' Liability Act, then the petitioner must seek further for a remedy under the Merchant Marine Act, with reference to which, if he is not to be considered a "seaman" within the intendment of that act, the provisions of the same cannot by him be properly invoked. His remedy, therefore, remains necessarily confined to the original admiralty jurisdiction of the United States District Court in proceedings either *in rem* against the vessel or *in personam* against his employer (U. S. Code, tit. 28, sec. 371, subdiv. 3).

The respondents, therefore, most respectfully submit to this Honorable Court that, for the reasons hereinabove set forth, the petition for writ of certiorari herein should be dismissed with costs to the respondents.

Respectfully submitted,

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